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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 346

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, ANNA CHRISTENSEN, PETER VISSER AND WILLIAM STERNBERG,

Petitioners,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

Respondent

REPLY TO BRIEF IN OPPOSITION

JOHN W. CRAGUN,
Counsel for Petitioner.

LAWRENCE J. WEST,
SIDNEY W. MANDEL,
MILLARD C. EISEMAN,
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Jurisdiction

The objection to the jurisdiction of this Court is captious. The order purporting to grant a 61-day extension instead of the 60 days authorized by the statute is not void, as were the orders in *Monks* v. *Lee,* 317 U. S. 590, and *Cresswell* v. *Tillinghast,* 286 U. S. 560, since in those cases jurisdiction of the Court had wholly expired at the time the order for extension or the order allowing the appeal was entered. Here it had not. In this case the order was entered June 19 (R. 652), although time would not have expired until June 21 (R. 647). Concededly, the order

was not effective to extend the time beyond the 60 days authorized by the statute—which would expire not August 21, 1945, the date recited in the order of extension, but August 20, 1945. The petition was filed on August 20, 1945, and is therefore timely. ROBERTSON & KIRKHAM, *Jurisdiction Sup. Ct. U. S.*, § 352, p. 719; § 383, p. 774; § 386, p. 776. The petition for extension of time prayed (p. 5)—

> "that this Honorable Court may enter an order extending the time for filing of the petition for certiorari sixty (60) days from the 21st day of June, A. D. 1945."

The order of Mr. Justice Murphy was manifestly intended to allow this 60-day extension. He had jurisdiction to grant a 60-day extension. The petition was filed within the 60 days thus allowed.

Scope of Review of Questions of Fact

Respondent attempts to explain away the ruling of the court below that it must accept the findings of the district court if there is "*any rational* basis to support them" on the ground that the court below really did not mean to announce such a rule, but instead actually reviewed the facts and found that the findings had "*ample support*" in the record and must be accepted.

(a) The opinion of the court below plainly must be read as announcing the any-rational-basis rule; and that is the only rule which the editor of the Federal Reports has been able to extract from the case on this point. Syllabus No. 3 of the report of this case, 148 F. 2d 128, reads:

> "Where record affords a rational basis in supporting findings of master and District Court, Circuit Court of Appeals must accept such findings."

The profession will, therefore, regard this case as establishing the rule.

(b) The "ample support" of which the court below speaks is ample support for the findings according to the any-rational-basis rule by which it announced it was measuring the case. In order for the support for findings to be "ample," it would have to be ample according to some standard or rule; and here it was held ample not in accordance with the rule in equity and under Rule 52 of the Rules of Civil Procedure, but ample to show "any rational basis" for the findings. Even if there could be an "ample support" rule, then it would follow not that there is no conflict, but that the court below has engrafted a new "ample support" rule upon the law relating to the scope of appellate review. Therefore, if respondent is right, there is further conflict with the cases cited in the petition.

(c) Since the decision below, there are now three rules which have been applied to the review of the findings of a district court: (1) Rule 52 of the Federal Rules of Civil Procedure, providing findings shall not be set aside unless "clearly erroneous"; (2) the rule that findings shall not be set aside if supported by "substantial evidence"; and (3) now, for the first time in our legal history, the rule that they shall not be set aside if there be "any rational basis" to support them.

These three rules are of ascending difficulty for an appellant to meet. It has recently been shown, STERN, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944), 58 Harv. L. Rev. 70, 79, 80-89, that it is possible for there to be substantial evidence to support a finding and yet for an appellate court to hold, consistently with the new Rule 52, that it is "clearly erroneous." Even less than substantial evidence would serve to provide a "rational basis" for sustaining a finding—e.g., the present case, where under the usual rules as to varying a written contract by parol, there was no

competent (let alone any substantial) evidence to support the finding, and yet the court below rationalizes a basis for upholding the findings of the district court. STERN, *op. cit.*, shows that the intention of this Court in the adoption of the "clearly erroneous" provision in Rule 52 was to allow broader review of facts, rather than the more narrow review accorded under the "substantial evidence" rule. The court below has, however, constricted review within even narrower limits. Its judgment ought to be reversed.

Further Conflict With Local Law

Respondent asserts (Brf. Opp., p. 4) that the court below "carefully examined the testimony of all witnesses, and documentary evidence." This is inaccurate. We have not burdened the Court with a review of the evidence; but it is worthy of note that neither the court below nor respondent in its statement and appendix have noted or considered the testimony of Harold A. Reise (R. 343-370) showing that the only logical basis for the allowance on the books of American Old Line Life Insurance Company of $173,846.54 for "Contingency Reserve" was to cover the superadded liability on the bank stock in question in this suit. Respondent has persistently urged that the books of American Old Line were used as the basis for the purchase of its assets and assumption of its liabilities, and stresses that American Old Line warranted the accuracy of the books and records (p. 3, p. 12). But from those books it is shown that a deduction from the assets of the company had already been made to provide for this very liability if it should ripen. Below, respondent's answer was that "contingency reserve" was of uncertain meaning, and did not imply a deduction from the assets of the company—so that it was not accurate to say that respondent was already compensated for the whole amount

of the contingent liability which it assumed in the "Re-insurance Agreement." This argument, however, flies in the face of a recent decision of the Illinois courts. The Appellate Court of Illinois has, since the opinion below, itself authoritatively defined the "contingency reserve" under the laws governing insurance in that state as being a "safety fund"—not a part of the legal reserve or the divisible surplus (for dividends), but a sum to cover extraordinary hazards of the insurance business. *Lubin* v. *Equitable L. Assur. Soc.* (1945), 61 N. E. 2d 753, 755. That case establishes further error in the judgment below, and further establishes that the court below has failed and refused to review the case on the basis of the meaning of the contract under the law of Illinois.

Respectfully submitted,

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